Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JOAN E. CAVALLARO,
Petitioner
v.
KEITH GALLANT, ADM.,
Respondent

On Petition For A Writ of Certiorari To The Connecticut Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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Joan E. Cavallaro
Pro Se
P.O. Box 9
Branford, CT 06405
(203) 488 - 1169

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision at hand violate Fourteenth Amendment guarantees of Equal Protection, with respect to property rights protected under the Fifth and Fourteenth Amendments, by distinguishing and creating, without rational basis, two classes of property owners: one class whose property can be partitioned only by a co-owner of the property; the other class whose property can be partitioned by a creditor with no title or ownership interest in the property?

2. Does an assumption of subject matter jurisdiction by a state court, absent legislative empowerment, with respect to property rights protected under the Fifth and Fourteenth Amendments, violate the Fourteenth Amendment's guarantee of Due Process?

3. Does a failure of a state court to address issues properly before it of lack of subject matter jurisdiction, and in light of 2. *supra*, with respect to property rights protected under the Fifth and Fourteenth Amendments, raised by the *Pro Se* appellant violate the *Pro Se*'s Fourteenth Amendment guarantees to Equal Protection and Due Process?

4. Is the judgment at hand void for lack of procedural due process in particular in that no opportunity was afforded to request a jury trial on the issue of title determination?

PARTIES TO THE PROCEEDINGS

Jackson T. King
Farren & King
94 Prospect St.
P.O. Box 1989
New Haven, CT 06521
Tel: (203) 562- 3248
counsel for
Julie Cooper, defendant

Charkes D. Ray
Cummings & Lockwood
Citiplace 1
Hartford, CT 06103
Tel: (860) 275-6700
Fax: (860) 721-3397
counsel for
Keith Gallant, Adm.,
plaintiff

Mary Malcolm
110 Essex Circle, Apt. B
Guilderland, NY 12084
Tel: (518) 456-6245
Pro Se, defendant

Pierre Kolakowski
Zeichner, Ellman &
Krause
35 Mason St.
Greenwich, CT 06830
Tel: (203) 622-0900
Fax: (203) 862-9889
counsel for
Bank One, Texas
defendant

Frederick Leaf
234 Church St,. Room 401
P.O. Box 3253
New Haven, CT 06515
Tel: (203) 776- 9368
Committee

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Official and Unofficial Reports of Opinions

50 Conn App 132, released August 25,1998
Oral Decision, Approval of Sale (Jan 14, 1997)
Judgment for Partition (August 23, 1996)

Basis for Jurisdiction

50 Conn App 132, released 25, 1998
Motion for Extension of Time to File Petition for
Certification (to Connecticut Supreme Court)
Granted on 9/10/98 until 10/5/98
Denial of above Petition 11/3/98
Motion for Extension of Time to File Motion to
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Constitutional Provisions and Statutes

Fifth Amendment to the United States Constitution
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§ 52 - 495
§ 52 - 500
§ 45a - 326
§ 45a - 98
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Facts of the Case

The administrator of an intestate estate brought an action for partition by sale of certain real property (herein "the property") in Superior Court alleging (1) "the Estate is unable to pay its debts, taxes and expenses of administration without the sale of the property" [a statement vacuously true since an estate is not a legal entity and cannot pay or not pay anything]; (2) that the defendants are the sole owners of the property.

No evidence was presented at the partition hearing and the court did not find that assets of a sale were needed to pay estate debts and no invoice or dollar amount was introduced.

A partition auction was held November 23, 1996 and the sale approved (1/14/97), however the sale has never been effected.

Time of federal questions raised: In addition to questions of due process inherent in the trial file, federal questions were addressed in the petitioner's Brief and, because new parameters were introduced with the Appellate Court's decision, in the petitioner's Petition for Certification to Appeal to the Connecticut Supreme Court and following Motions to Reconsider. The Fifth and Fourteenth Amendment (as well as Ninth and Tenth Amendment), due process, equal protection, common law and fundamental rights arguments are evidenced in the excerpts from the Brief, Reply Brief, and Motion to Reconsider included in the Appendix specifically at A - 26-28,34-42,46 and passim.

In particular, the petitioner briefly notes: At Appendix page 27 (A-27): "Clearly, there is no procedural due process without subject matter jurisdiction, so that an adjudication of one is an adjudication of the other"; (A-26): "As C.G.S. §52-500 is in derogation of common law and fundamental rights, it must be strictly construed"; (A-34): Item 1c., regarding fundamental fairness, equal protection, due process for *pro ses* (petition for certification to Connecticut Supreme Court).

ARGUMENT

The word "partition" produces a knee-jerk reaction of inevitability and absolute right. As a result, it is difficult to get a court to consider or review the actual parameters of a partition.

But partition is of right only under certain specific and limited circumstances. When the boundaries of these requirements are breached, the partition is void.

This case is before this court today because the breach of those boundaries violates rights guaranteed under the United States Constitution.

Argument In *Re* Numbered Questions For Review:

(Note 1: Reading at this point Appendix pp. A -18-26, which may serve as a refresher on partition law, will economize the following. Connecticut law in this area is similar to that in most states, as found in Am. Jur., C.J.S.,*et alia*..
Note 2: Appendix citations in square parentheses in the text denote explanatory sections of petitioner's Briefs, Petition, and Motion to Reconsider.
Note 3: Partition originated in common law and has been extended by statute (for historical references, see Teasely v. Hulme, 104 S.E. 151; history of partition in Connecticut, see Penfield v. Jarvis, 175 Conn 463).

Question Number 1:

Taking the decision under review at face value, two classes of property owners are created. In one class, by Hornbook law, property owned together with others can be partitioned only by a co-owner. In the second, property owned together with others can be partitioned by a non-owner who presents as a creditor.

This division, now the law of Connecticut, violates the Equal Protection clause of the Fourteenth Amendment because (a) in no

Erratum:
Page numbering omits page 4, but there is
no gap in the text

other circumstance can a creditor partition property owned by others; (b) there is no rational basis for this division, and creditors have ample statutory recourse elsewhere; (c) the schema is in derogation of common law and fundamental rights.

(a) Partition is a legal mechanism for transferring an undivided interest of a co-owner in a property into a divided interest in that property.

The legal purpose of partition is to provide separate domains for owners (Johnson v Olmstead 49 Conn 509,517) [A - 19]; a creditor cannot partition property of others for the purpose of paying debts (Vail v Hammond 60 Conn 374 [A - 20].

(b) The essence of equal protection is the guarantee of equal treatment for parties who stand "in the same relation to the purpose of the statute" (Ohio v Dollison 194 U.S. 447; see also International Harvestor Co. V Missouri 234 U.S. 199, Kaelin v Warden 334 F.Supp 802).

An administrator of an estate cannot be an owner of real property which passes on demise to the heirs [A - 20-21]. Conversely, he has adequate remedy at law the decedent's prior interest in the property through Probate Court [A - 22-23], which also is faster and less expensive [see e.g. A -39]. The power to sell real estate which has passed on demise is exclusively granted to probate court by the legislature [A - 22,23 and *infra*]. In such a sale, the administrator, if he is the committee appointed to sell, acquires a mere 'power to sell' but not an ownership interest (citations omitted); the proceeds from such a sale do not go into the estate under administration but form a separate fund under the Probate Court [A - 23,fn3,A-30 and *infra*]. "Real estate forms no part of the estate the administrator is appointed to administer..." (State *ex rel.* Moriarty v Donahue 82 Conn 308,313).

Even if an administrator could partition by sale he could not access or utilize the proceeds of the portion of the property never owned by the decedent. What purpose does it serve the state to sell that portion?

Under the current decision, a mere allegation of need of assets

to pay debts suffices to potentially effect a sale. But the determination of whether assets are needed to pay debts is within the sole jurisdiction of the Probate Court [A - 33 and standard probate references].

Partition for the purpose of paying debts lacks the guarantees built into debt collection processes such as foreclosure which requires, in Connecticut, specifying and proving debts, a redemption date, and an appraisal, none of which are of right in a partition in Connecticut [cf. A - 27]. In Connecticut, an administrator is not required to permit the equivalent of redemption or the heirs to pay any debts claimed to the estate.

Furthermore, an administrator has a fiduciary duty to conserve assets.

The decision at hand essentially re-writes the law and creates two vaguely outlined boundaries which burden property owners and which, were they explicitly enacted in the statute, would be arguably void for vagueness. However they are now *de facto* encoded in the statute, as the decision is now precedentially law of the state.

These two new boundaries are: (1) What now is "interest" in real property, if it is no longer confined to a claim of some kind of ownership or legal easement [A - 21,22]? Further, since an administrator is supposed to be disinterested in the estate, does conferring him an "interest" in real property that passed on demise compromise this, particularly given that he could access the property via probate statute specifically enacted by the legislature to deal with that purpose? The two key citations here are Buel's Appeal from Probate 60 Conn 63,65 [defendant-appellant's Brief at A-22 and ff] describing the history of the legislature's grant of authority to probate court only (and see Dorrance v Raynsford 67 Conn 1,7 [A -23] "special statutory power") and State *ex rel* .Moriarty v Donahue op cit.82 Conn 308,313 , [A - 23fn3,A-30 (and portions of Reply Brief herein omitted, at p.10)] explaining the separation of funds derived from a sale of real estate that has passed on demise from estate funds under administration or settlement .

(2) What exactly constitutes an allegation of need of assets to

pay estate debts? Does the superior court need to hold an inquiry to see if assets are so needed and whether sale of the property is the best method to achieve such an end , which is under the jurisdiction of probate court [A - 33]? Traditionally in probate court sale of real estate which had passed on demise could not be accessed until exhaustion of personalty was demonstrated. And is not this all why the legislature gave probate court the special power to access such property in the first place?

(b) Secondly, what benefit is it to the state to put the proceeds of a sale of real estate which has passed on demise into the personalty estate under the administration of the fiduciary (title to personalty held by fiduciary) who can then spend it at will and account for it later, rather than into the probate "special fund" held by probate court separate from settlement, from which the administrator can request specific amounts to pay specific, allowed debts, and the fund thus held in trust by the court later released to the heirs, in the same proportions as the real estate would have been (State *ex rel.* Moriarty v Donahue op cit. 313), which was the purpose of the statute anyway? (In Connecticut the probate court does not pass title to real estate, which passes on demise, but only determines who the heirs or devisees are and issues a certificate of devise or descent (Connecticut Standards of Title Connecticut Bar Association, 1980, Chapter XIII, Standard 13.1).

Lastly, if an administrator acquires interest sufficient to partition by just an *allegation* of need of assets to pay debts, could it not happen that an administrator believe he needs assets, sacrifice the property, and later find the sale was not necessary for the payment of claims?

(c) Forcible partition clearly "burdens a fundamental right" (Romer v Evans 517 U.S. 620,631) and hence must be held to a strict construction [A - 26,27]. Furthermore

> Choices about...family life...are among the associational rights this Court has ranked as "of basic importance in our society" Boddie, 401 U.S., at 376, rights sheltered by the Fourteenth Amendment against the State's unwarranted

usurpation, disregard, or disrespect.(M.L.B. v S.L.J. 519 U.S.102,116, further citations omitted)

The case at hand concerns the family property of 54 years. The construction in this decision of C.G.S. 45a-98(a)(3), which now includes determinations regarding joint tenancy [A - 15], assaults disproportionately the elderly, widows and widowers , who most commonly are co-owners.

Question Number 2:

The Appellate Court determined that superior court now has subject matter jurisdiction over real estate which passed on demise because superior court and probate court have "...concurrent jurisdiction to entertain an action for partition in this case"[1] [A - 4] based on:

(a) that C.G.S. §45a-98(b) (enacted in 1990; for its purpose see citation from its legal history at A - 39) states

> "[t]he jurisdiction of courts of probate to determine title or rights ... is *concurrent* with the jurisdiction of the Superior Court and does not affect the power of the Superior Court as a court of general jurisdiction" (Emphasis added [by the Court]) [A - 4]

However C.G.S §45a-98 confers jurisdiction only on probate court:

> **General Powers.** Courts of probate ... shall have the power to... determine title and rights of possession and use in and to any real ... property ... that constitutes, or may constitute, all or part of any decedent's estate..." [A - 15]

Superior Court's powers, delineated in C.G.S. § 51-164s , specifically exclude those powers delegated to probate courts. ("..shall be the sole court for original jurisdiction for all causes of

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1. Superior can partition such property among the (living) owners, e.g. the heirs or devisees [A-23at fn3] upon complaint by a (living) owner.

action except such actions over which the courts of probate have original jurisdiction.."[A -16]). Superior Court has no subject matter jurisdiction over lands formerly belonging to the deceased, as per *supra*, a power delegated to probate court only (Buel's Appeal from Probate 60 Conn 63,65, cited in petitioner's brief at A - 22). (One who seeks assets from realty which has passed on demise in superior court of equity or law has "mistaken his remedy, which is through the medium of an order of sale from the Court of Probate", Mathewson v Wakelee 83 Conn 75, 78-79 [A - 40]). Only the legislature has the power to access and sell real estate formerly belonging to the deceased, and it delegated that power solely to probate court [A - 22-23]. Superior Court at common law has no right to sell lands of the deceased (Wooster v Hunt's Lyman Co, 38 Conn 76,78-9 [A - 43]).

Superior Court title determination, delineated in C.G.S. § 47-31 [A - 17], is the examination of records and deeds none of which can show the administrator as title holder.

Hence C.G.S. §45a-98 should be emphasized thusly: " Is concurrent with *the* jurisdiction of the Superior Court....", *the* jurisdiction under C.G.S. § 47 -31.

(b) that a determination of title statute can confer right of partition on a non-owner. Ordinarily, it is Hornbook law that lack of title in the plaintiff is the defense against partition.

(c) that the decision in Claydon v Finizie 7 Conn App 522 enabled the administrator in this case, G, to acquire an interest in the property:

> The only significant distinction between *Claydon* and the appeal before us is that the plaintiff-administrator in *Claydon* did not allege that a partition of the property was necessary to settle claims against the estate ...
>
> The converse of the *Claydon* rule is that if the administrator alleges that the property is needed to settle claims against the estate, then he meets the requirement of having an interest in the property. [A - 5]

"Interest" with respect to realty is ownership [A - 21,22]; in

Claydon, the trial court found that the administrator held a tenancy-in-common[2] (which is possible when realty is held in a personalty vehicle prior to demise), (*Claydon*, op cit.. 523-4). The *Claydon* court denied the right of a title holder who is an administrator to partition on strength of title alone (Ibid 524-6 [A-24,25,37]); the *Claydon* court did not extend rights of partition to a non-owner.

G's inability to allege any ownership interest invokes subject matter jurisdiction (see *infra*).

(d) that G could have partitioned the property via probate court [A - 3]. C.G.S. § 45a-326 [A - 15] refers to real property as personalty ("persons who died owning", "owners of the other portion"), and requires that the owners seek partition [A - 15,44].

Question Number 3:

The Appellate Court decision appears to have missed two key points regarding subject matter jurisdiction raised by the *pro se* appellant in her brief:

(a) G could not allege *any* set of facts which could give him standing: An administrator *qua* administrator cannot have any interest in real property which passes at demise. Lack of ability to allege anything which confers standing invokes lack of subject matter jurisdiction.

(b) Superior Court has no subject matter jurisdiction over lands formerly belonging to the deceased (*supra*).

Furthermore, as pointed out in the petitioner's Brief and Reply Brief [A - 24-5,30-33], in all the cases of relevant issues the court dismissed the case for lack of subject matter jurisdiction, often *sua sponte*. In those cases, the defendant was represented by counsel. In the case at hand, the appellant in the appeal was a *pro se*, and the

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2 The trial court had found that title was as alleged in the plaintiff's complaint (Claydon v Finizie op cit. 523), and the plaintiff had alleged a tenancy in common (Ibid 524-5). The Court's ruling was re that allegation and finding (Ibid 525).

case was not dismissed despite the *pro se*'s raising and documenting the issue.

Question Number 4:

Without going into a catalogue at this time, the petitioner notes that by the Appellate Court's implementing a title statute after hearing and judgment, and especially as (a) the plaintiff had alleged no title interest and stated the defendants were the sole owners of the property, (b) lack of title is a *defense* against partition, and (c) there was no request to try title in the complaint, arguably the procedural due process rights of the petitioner were denied with respect to the opportunity to seek a jury trial on the particular issue of title determination.

Motivation to Grant Certification:

By United States Supreme Court Rule 10 (b), (c), the decision under review conflicts with, quite frankly, every other state or federal decision the petitioner has come across regarding partition. Consistently, partition is only for owners, not for creditors, and a fiduciary of an estate has no standing to bring partition (47 C.J. Partition §203; 68 C.J.S. Partition §68f) absent specific legislative grant, including when there is an allegation of assets needed to pay estate debts (need of assets to pay estate debts does not cure lack of standing of fiduciary, Owings v Owings 114 N.W. 393).

This decision discriminates against and puts a hardship on vulnerable persons: the elderly and bereaved.

The petitioner took full care of her Mother, who was disabled for the last twelve years of her life; she is acutely aware of the vulnerability of the elderly.

The petitioner saved the State of Connecticut, otherwise responsible for Mother's care, over $400,000; her full portion of this property serves in lieu of savings from earnings at a profession during those years.

We speak today of a loss of "family values". But if our courts do not uphold such values, who will?

Lastly, I would like to address the fact that I am a *pro se*. During this case I have had to go up against one of the largest law firms in the state, including 7 lawyers of record over three offices. I have held them at bay with a pen.

At oral argument at the Appellate Court, I began by saying that I was proud to live in a country where a citizen could represent herself in appellate court, even if it was the last thing I would ever want to have to do.

I have no interest whatsoever in spending my energies in this process. I do it because there are things I value, there are things of value, because it is the right thing to do, and because the elderly are already treated poorly enough; they don't need another burden.

Justice O'Connor apparently noted when speaking locally last fall at Quinnipiac Law School, according to local newspaper accounts, that there is a great need for legal representation and that lawyers should do more *pro bono* work: it's the difference between a "business and a profession".

Let me turn that back to the Court: There is another way to help fill that gap in representation; that is for the courts to recognize *pro ses*. Our Constitutional guarantees are, after all, *pro se* guarantees.

If the higher courts will not take *pro ses* seriously, the lower courts never will.

As near as I can determine, in the last 20 years the United States Supreme Court has never granted cert to a *pro se*. Why not?

BY: Joan E. Cavallaro

Joan E. Cavallaro
Pro Se
P.O. Box 9
Branford, CT 06405
(203) 488 - 1169

APPENDIX

KEITH BRADOC GALLANT, ADMINISTRATOR (ESTATE OF THELMA S. CAVALLARO) v. JOAN CAVALLARO ET AL.
(AC 16867)

O'Connell, C. J., and Landau and Schaller, Js.

Argued January 15 -- officially released August 25, 1998

(PROCEDURAL HISTORY)

Action for the partition of certain real property, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Barnett, J.;* judgment ordering partition by sale and appointing a committee to conduct the sale; thereafter, the court, *Celotto, J.*, granted the committee's motions for, inter alia, approval of the sale, and the named defendant appealed to this court. *Affirmed.*

Joan Cavallaro, pro se, the appellant (named defendant).

Charles D. Ray, with whom, on the brief, was *William H. Narwold*, for the appellee (plaintiff).

(OPINION)

O'CONNELL, C. J. The named defendant, Joan Cavallaro,[1] appeals from a judgment of partition and sale of property at 26 Crescent Bluff Avenue in Branford. Prior to her death, Cavallaro's mother owned an undivided one-half interest in

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1. The other defendants were Cavallaro's sisters, Mary Malcolm and Julie Cooper, and Bank One, Texas, which held a mortgage on the property. Cavallaro was the only defendant who contested the partition and sale.

the property as a tenant in common with her three daughters, Cavallaro, Mary Malcolm and Julie Cooper, each of whom owned an undivided one-sixth interest.

The Probate Court for the district of Branford appointed the plaintiff, Keith Bradoc Gallant, administrator of the decedent's estate. Gallant brought this action for partition and sale of the property in the Superior Court, alleging that the estate was unable to pay its debts, taxes and expenses of administration without obtaining the proceeds of the sale of the property.

Following an evidentiary hearing, the trial court rendered an oral decision in the plaintiff's favor, ordering the partition and sale. The trial court subsequently appointed a committee to conduct the sale, which took place on November 23, 1996. Despite Cavallaro's objection, the trial court approved the sale and this appeal followed.

On appeal, Cavallaro claims that the trial court (1) lacked subject matter jurisdiction to entertain this partition action and (2) improperly approved the sale in view of the circumstances surrounding it. We affirm the judgment of the trial court.

I

Cavallaro's first claim may be divided into two issues: first, whether the trial court had jurisdiction to entertain this action, and, second, even if the trial court had jurisdiction, whether the administrator had standing to sue for partition.

A

In the first part of this claim, Cavallaro raises an issue of the Superior Court's jurisdiction. Whenever a claim of lack of jurisdiction is brought to the court's attention, it must be resolved before the court can proceed. *Castro v. Viera*, 207 Conn. 420, 429, 541 A.2d 1216 (1988); *Vincenzo v. Warden*, 26 Conn. App. 132, 135, 599 A.2d 31 (1991).

The jurisdiction of Probate Court to entertain partition actions during the settlement of an estate is not disputed. General

Statutes Sec. 45a-326.[2] The jurisdiction of the Superior Court to entertain partition actions is likewise not in dispute. General Statutes Sec. 52-495[3] and 52-500.[4] The crux of Cavallaro's argument is that when an estate is in settlement, the Probate Court has sole jurisdiction to order a partition of property within the estate to the exclusion of the Superior Court. We are not persuaded.

We first note that "{w}hen two statutes relate to the same subject matter every effort should be made to find a reasonable field for the operation of both statutes... {and} where there is a reasonable field of operation for each statute which does not impinge on the domain of the other, it is the court's duty to give them concurrent effect." (Internal quotation marks omitted.) *Whalen v. Ives*, 37 Conn. App. 7, 11, 654 A.2d 798, cert. denied, 233 Conn. 905, 657 A.2d 645 (1995). Thus, every effort should be made to reconcile the operation of Sec.45a-326 with that of Sec.

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2. General Statutes Sec. 45a-326(a) provides: "During the settlement of the estate of any person who died owning an undivided interest in any property not specifically devised or bequeathed, the executor or administrator of the estate and the owner or owners of the major portion of the other interest therein may apply in writing to the court of probate having jurisdiction of the estate to order partition of the same."

3. General Statute Sec. 52-495 provides in pertinent part "Courts having jurisdiction of actions for equitable relief may, upon the complaint of any person interested. order partition of any real property held in joint tenancy, tenancy in common, coparceny or by tenants in tail..."

4. General Statutes Sec. 52-500 (a) provides: "Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any property, real or personal. owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners."

52-495 and 52-500.

The fallacy in Cavallaro's otherwise well analyzed brief is that it does not give proper weight to two other statutes, General Statutes Sec. 45a-98 (b) and 52-503. Section 45a-98 (b) expressly provides that " {t}he jurisdiction of courts of probate to determine title or rights... is *concurrent* with the jurisdiction of the Superior Court and does not affect the power of the Superior Court as a court of general jurisdiction." (Emphasis added.) This section is a declaration that the Probate Court and the Superior Court are to have concurrent jurisdiction over matters involving title and rights to property.

Section 52-503 provides that "{n}o partition, or sale in lieu of partition, may be made of any property, real or personal, *belonging wholly to an estate in settlement in any court of probate until the estate is ready for distribution.* "(Emphasis added.) Thus, Sec. 52-503 is a limitation on the partition and sale powers granted to the Superior Court by Sec. 52-495 and 52-500 and, therefore, a limitation on the Superior Court's otherwise concurrent jurisdiction with the Probate Court.

A plain reading of Sec. 52-503 indicates, however, that if the property does *not* belong wholly to an estate in settlement, then the Superior Court may proceed with partition. The property in the case before us does not belong wholly to an estate in settlement because only a one-half interest in the property belongs to the decedent's estate, while the other one-half interest belongs to the decedent's three daughters. Accordingly, the restriction of Sec. 52-503 is not relevant here and, therefore, does not apply to limit the jurisdiction of the Superior Court.

We conclude that the Superior Court and the Probate Court had concurrent jurisdiction to entertain an action for partition in this case.

B

Cavallaro next argues that even if the Superior Court had concurrent jurisdiction to entertain this action, the plaintiff, as an

administrator, lacked standing to sue for partition. General Statutes Sec. 52-495 and Sec. 52-500 confer authority on the Superior Court to order partition and sale upon the complaint of any person interested.[5] Cavallaro relies on the well established doctrine that "{u}pon the death of the owner of real estate, neither the executor not the administrator holds title. *Ryder v. Lyon*, 85 Conn. 245, 252, 82 A. 573 (1912). Title immediately descends to the heirs or devisees of real estate, subject to the right of administration. *O'Connor v. Chiascione*, 130 Conn. 304, 33 A.2d 336 (1943)." *Goodman v. Bank of Boston Connecticut*, 27 Conn. App. 333, 341, 606 A.2d 994 (1992).

The issue of whether the administrator of an estate has standing to sue for partition and sale of real property partially belonging to the estate was addressed by this court in *Claydon v. Finizie*, 7 Conn. App. 522, 508 A.2d 845 (1986). The administrator in *Claydon*, like the plaintiff in the case before us, sought partition and sale in the Superior Court of property belonging to the decedent and her three children. The only significant distinction between *Claydon* and the appeal before us is that the plaintiff-administrator in *Claydon* did not allege that partition of the property was necessary to settle claims against the estate. As a result, the *Claydon* court concluded that the administrator did not satisfy the requirement of Sec. 52-495 and Sec. 52-500 that the action be brought by a person with an interest in the property. Id., 526.

The converse of the *Claydon* rule is that if the administrator alleges that the property is needed to settle claims against the estate, then he meets the requirement of having an interest in the property. The plaintiff here made the requisite allegation; therefore, following *Claydon*, we hold that the plaintiff had standing to seek partition.

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5. See footnotes 3 and 4.

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{SUPERIOR COURT, NEW HAVEN, CT, JANUARY 14, 1997
GALLANT v. CAVALLARO}

THE COURT: And the Court is going to rule as follows. That any further sale will result in expenses and fees which would be greater than what might reasonably be expected to accrue from the sale itself, which accrual would be in contrast with the successful bid that has already been made. So, in language that you might very clearly understand, I am denying your motion and I am ruling that the sale should go through to the successful bidder as was established at the time that the bidding took place.

S/Celotto, J

.....

D.N. CV 95-0373971 SUPERIOR COURT

KEITH B. GALLANT, ADMINISTRATOR, Plaintiff, JUDICIAL DISTRICT O NEW HAVEN AT NEW HAVEN

v.

JOAN CAVALLARO, et el., Defendants. AUGUST 22 1996

JUDGMENT

This action, by writ and complaint, claiming a partition by sale of the premises at 26 Crescent Bluff and 241B Pine Orchard Road, Branford, Connecticut and a division of the proceeds after the expenses of the sale and the estate of Thelma S. Cavallaro among the parties according to their respective rights in the premises came to this Court on June 6, 1995, and thence to the

present time, when the parties appeared and were at issue to the court, as on file.

The Court, having heard the parties first on August 7, 1996 and again on August 21, 1996, wherein the Court granted Plaintiff's Motion to Amend the Complaint to file the Second Amended Complaint, finds the issues for the plaintiff, Keith Bradoc Gallant, Administrator of the Estate of Thelma S. Cavallaro. Whereupon it is adjudged that judgment enter in accordance with the Court's orders of August 7, 1996, a transcript of which is attached as Exhibit A hereto and is hereby incorporated by reference, and as amended and modified by the Court's orders of August 21, 1996, ordering the following:

1. Partition of the real estate, according to the respective rights of the co-owners.

2. Pursuant to Connecticut General Statutes Section 52-500, a sale of the Premises and a division of the proceeds, after the payment of the expenses of the sale, among the parties according to their respective rights in the real estate.

3. The appointment of Frederick P. Leaf, Esq., as Committee, to make such a sale.

4. An order of possession of the premises.

5. An order of ejectment of the Defendant Joan Cavallaro from the premises by September 15, 1996.

S/Barnett, J
[no date]

.....

APPELLATE COURT

STATE OF CONNECTICUT

AC NO. 16867 SUPERIOR COURT

KEITH GALLANT,	J.D. OF NEW HAVEN
ADMINISTRATOR	(CV-95-0373971S)
VS	AT NEW HAVEN
JOAN E. CAVALLARO, ET AL.	SEPTEMBER 1, 1998

DEFENDANT-APPELLANT'S
MOTION FOR EXTENSION OF TIME

Pursuant to PRACTICE Book Sec. 66-1, the defendant-appellant respectfully moves the court for an extension of time to file her petition for certification to the Supreme Court or Motion to Reargue, and other relevant motions, in the above-captioned case, of 20 days from the current due date of September 14, 1998.

{argument omitted}

{in script} Sept. 10, 1998
An extension to file a petition for certification is granted to Oct. 5, 1998. No further extensions.

S/Drumm, Chief Clerk

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SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-98-0177

Keith Gallant, Administrator (Estate of Thelma S. Cavallaro)
v.
Joan E. Cavallaro et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the named defendant for certification to appeal from the Appellate Court (50 Conn. App. 132 {AC 16867}), it is hereby ordered that said petition be, and the is hereby denied.

Norcott, J., did not participate in the consideration or decision of this petition for certification.

BY THE COURT,
S/Alan M. Gannuscio, Assistant
Clerk-Appellate

Dated: November 3, 1998
Notice sent: 11/4/98
Clerk, Superior Court, New Haven (CV950373971)
Clerk, Appellate Court
Reporter of Judicial Decisions
SAO
Joan E. Cavallaro, pro se
Farren & King
Mary Malcolm, pro se
Cummings & Lockwiid
Frederick P. Leaf
Zeichner, Ellman & Krause

Joan E. Cavallaro, pro se, in support of petition.

dcm

.....

STATE OF CONNECTICUT

SUPREME COURT

NO. AC 16867

KEITH BRADOC GALLANT, ADMINISTRATOR OF THE ESTATE OF THELMA S. CAVALLARO
V.
JOAN CAVALLARO ET A L **DECEMBER 21, 1998**

ORDER

THE MOTION OF THE NAMED DEFENDANT, FILED NOVEMBER 25, 1998, TO RECONSIDER CERTIFICATION, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED **DENIED**. NORCOTT, J., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

S/ Drumm, Chief Clerk

NOTICE SENT: DECEMBER 21, 1998
CUMMINGS & LOCKWOOD
FREDERICK P. LEAF
JOAN CAVALLARO, PRO SE
MARY MALCOLM, PRO SE
FARREN & KING
ZEICHNER, ELLMAN & KRAUSE
CLERK, NEW HAVEN J.D. (CV95-0373971S)
HON. DONALD W. CELOTTO
RJD 207/981212

.....

SUPREME COURT
STATE OF CONNECTICUT

AC NO. 16867	SUPERIOR COURT
KEITH GALLANT, ADMINISTRATOR	J.D. OF NEW HAVEN (CV-95-0373971S)
VS	AT NEW HAVEN
JOAN E. CAVALLARO, ER AL.	NOVEMBER 7, 1998

DEFENDANT-APPELLANT'S MOTION
FOR EXTENSION OF TIME

Pursuant to PRACTICE Book Sec. 66-1, the defendant-appellant respectfully moves the court for an extension of time to file her motion to reconsider her request and petition for certification to appeal the Supreme Court, in the above-captioned case, of 10 days from the current due date (of November 16, 1998).

[argument omitted]

[in script] Nov. 12, 1998 Granted to Nov. 25, 1998.
S/Drumm, Chief Clerk

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STATE OF CONNECTICUT

SUPREME COURT

NO. AC 16867

KEITH GALLANT, ADMINISTRATOR
v.

JOAN E. CAVALLARO ET AL. **JANUARY 28,1999**

ORDER

THE MOTION OF THE NAMED DEFENDANT, FILED DECEMBER 30, 1998, TO RECONSIDER-FINAL MOTION, HAVING BEEN PRESENTED TO THE COURT, IS HEREBY ORDERED **DENIED**. NORCOTT, J,. DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

S/ Drumm, Chief Clerk

NOTICE SENT: JANUARY 28,1999
JOAN E. CAVALLARO, PRO SE
FARREN & KING
FREDERICK P. LEAF
MARY MALCOLM
ZEICHNER, ELLMAN & KRAUSE
CUMMINGS & LOCKWOOD
CLERK, NEW HAVEN J.D. (CV95-0373971S)
HON. DONALD W. CELOTTO
RJD 236/981243

.....

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

April 28, 1999

Ms. Joan E. Cavallaro

P.O.Box 9
Branford, CT 06405

Re: Joan E. Cavallaro
v. Keith Gallant, Administrator
Application No. A-897

Dear Ms. Cavallaro:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on April 28, 1999, extended the time to and including June 28, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
by
S/ Melissa A. Blalock
Assistant Clerk

.....

UNITED STATES CONSTITUTION
AMENDMENTS

ARTICLE V.

No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV. (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

CONNECTICUT GENERAL STATUTES

Sec. 52-495. Partition of joint and common estates. Courts having jurisdiction of actions for equitable relief may, upon the complaint of any person interested, order partition of any real property held in joint tenancy, tenancy in common, coparcenary or by tenants in tail. The court may appoint a committee to partition any such property. Any decrees partitioning entailed estates shall bind the parties and all persons who thereafter claim title to the property as heirs of their bodies.

Sec. 52-500. Sale of real or personal property owned by two or more persons.

(a) Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any property, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the

owners.

(b) The provisions of this section shall extend to and include land owned by two or more persons, when the whole or a part of the land is vested in any person for life with remainder to his heirs, general or special, or, any part thereof, is held in trust or otherwise. A conveyance made pursuant to a decree ordering a sale of the land shall vest the title in the purchaser thereof, and shall bind the person entitled to the life estate and his legal heirs and any other person having a remainder interest in the lands. The court issuing the decree shall make such order in relation to the investment of the proceeds of the sale as it deems necessary for the security of all persons having any interest in such land.

Sec. 45a-326. (Formerly Sec. 45-257a). Partition or sale of undivided interest in decedent's estate. Notice. Hearing. (a) During the settlement of the estate of any person who died owning an undivided interest in any property not specifically devised or bequeathed, the executor or administrator of the estate and the owner or owners of the major portion of the other interest therein may apply in writing to the court of probate having jurisdiction of the estate to order partition of the same.

Sec. 45a-98. (Formerly Sec. 45-4). General powers. (a) Courts of probate in their respective districts shall have the power to (1) grant administration of intestate estates of persons who have died domiciled in their districts and of intestate estates of persons not domiciled in this state which may be granted as provided by section 45a-303; (2) admit wills to probate of persons who have died domiciled in their districts or of nondomiciliaries whose wills may be proved in their districts as provided in section 45a-287; (3) except as provided in section 45a-98a or as limited by an applicable statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of any trust,

any decedent's estate, or any estate under control of a guardian or conservator, which trust or estate is otherwise subject to the jurisdiction of the probate court, including the rights and obligations of any beneficiary of the trust or estate and including the rights and obligations of any joint tenant with respect to survivorship property; (4) except as provided in section 45a-98a, construe the meaning and effect of any will or trust agreement if a construction is required in connection with the administration or distribution of trust or estate otherwise subject to the jurisdiction of the probate court, or, with respect to an inter vivos trust, if that trust is or could be subject to jurisdiction of the court on request for an accounting pursuant to section 45a-175, provided such an accounting need not be required; (5) to the extent provided for in section 45a-175, call executors, administrators, trustees, guardians, conservators, persons appointed to sell the land of minors, and attorneys-in-fact acting under powers of attorney created in accordance with section 45a-562, to account concerning the estates entrusted to their charge; and (6) make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state.

(b) The jurisdiction of courts of probate to determine title or rights or to construe instruments pursuant to subsection (a) of this section is concurrent with the jurisdiction of the superior court and does not affect the power of the superior court as a court of general jurisdiction.

Sec. 51-164s. Superior court sole trial court. Jurisdiction transferred from court of common pleas and juvenile court. The superior court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. All jurisdiction heretofore conferred upon and exercised by the court of common pleas and the juvenile court prior to July 1,1978 shall be transferred to the superior court on

July 1, 1978.

Sec. 47-31. Action to settle title or claim imterest in real or personal property. (a) An action may be brought by any person claiming title to, or any interest in, real or personal property, or both, against any person who may claim to own the property, or any part of it, or to have any esyaye in it, either in fee, for years, for life or in reversion or remainder, or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.

.....

(f) The court shall har the several claims and determine the rights or the parties, whether derived from deeds, wills or other instruments or sources of title, and may determine the construction of same, and render judgment determining the questions and disputes and quieting and settling the title to the property.

DEFENDANT APPELLANT'S BRIEF
(Excerpts)

IV. ARGUMENT

1. ONLY OWNERS OF REAL PROPERTY CAN SUE UNDER G.S. § 52-500, AND AN ADMINISTRATOR IS NOT AN OWNER.

A. The court lacked subject matter jurisdiction in this case from the outset because the plaintiff-administrator did not have standing to bring the action.

It is well established in Connecticut law that an administrator or executor of an estate does not have standing to sue for partition under G.S. § 52-500. This statute applies only to owners of the property in question, and an administrator is not an owner as title to real estate passes on demise to the heirs or devisees (see *infra*).

In the present case, the administrator does not claim an ownership of the property in question, but states in his Complaint and amended complaints that the three siblings (heirs) are the owners of the property, each being an owner of an undivided one third interest (SAC-2, A-24; AC-2, A-17; C-1-2, A-12-13), and seeks "a partition of the real estate according to the respective rights of the co-owners" (SAC-4, A-26; AC-3, A-18; C-3, A-14). Thus by the pleadings alone in this case the administrator-plaintiff has no interest in the property and hence no standing. Neither did the trial court find, or address the issue of, any ownership interest regarding the administrator (Judgement, 8/7/96, pp.1-4, A-19-22).

Standing is in general predicated on whether a plaintiff is an appropriate party to bring suit and not on whether there may be an issue of merit involved (Flast v Cohen, 392 U.S.83,99, 88 S.Ct.1942, 20 L.ED 2d 947, cited in Hartford Kosher Caterers,

Inc. v Gazda, 165 Conn 478,485; Mystic Marinelife Aquarium, Inc. v Gill, 175 Conn 483,492; Berlin v Santaguida, 181 Conn 421, 423-424).[1]

The purpose of the statutes (now G.S. § 52-495, 52-500, (A-2,1)) which enable a Superior Court to partition property is to provide relief to owners:

> No person can be compelled to remain the owner with another of real estate...every owner is entitled to the fullest enjoyment of his property, and that can only come through an ownership free from dictation by others as to the manner in which it may be exercised. Therefore, the law afforded to every owner with another relief by way of partition...,
>
> Johnson v Olmstead, 49 Conn 509,517; see Wilcox v Willard Shopping Center Assoc., 208 Conn 318,325; see Geib v McKinney, 224 Conn 219,224;

Only an owner can sue under the Superior Court partition statutes:

> A series of decisions has shown that this statute applies only in cases of ownership. It does not mean that any person interested in any way in real

---

1. And clearly the issue of subject matter jurisdiction can be raised at any time (Labow v Labow, 171 Conn 433,440); even after five years (Monroe v Monroe, 177 Conn 173,177); and the lack thereof cannot be waived (Labow v Labow, op. cit. 440); neither can jurisdiction be conferred by agreement or silence of the parties (Manafort Bros., Inc. v Kerrigan, 154 Conn 112,114); neither does practice of power confer subject matter jurisdiction (State v Tedesco, 175 Conn 279, 286).

In researching her brief for this appeal, the movant, recently *pro se*, found that the trial court lacked subject matter jurisdiction; hence the issue was not raised at trial.

> or personal estate may bring a complaint and that the court must order a sale. But only those interested therein as owners are so entitled. *Spencer v Waterman*, 86 Conn. 342; *Wilson v Peck*, 39 Conn. 54; *Potter v Munson*, 40 Conn. 473; *Ford v Kirk*, 41 Conn. 9; *Johnson v Olmsted*, 49 Conn. 509.
>
> This statute does not confer any power on the court to order a sale of property for the purpose of paying debts. Vail v Hammond, 60 Conn 374, 379-380. (See also Norwoski v Kichar, 181 Conn 251,253; Harrison v International Silver Co., 78 Conn 417,410; Maggi v Mitchell, No. 2604 (Feb 11,1992) 1992 Ct. Sup. 1699, 1700 (A-67-69)

Thus the statute is specifically not a vehicle for paying anyone's debts, even an owner's, and a creditor cannot sue under the statute much less the representative of a creditor (Sutton v Mansfield, 47 Conn 388,389).

That ownership and title to real estate pass upon demise is law set in granite in our state (Foote v Brown, 81 Conn 218,224; passim, cases cited in this brief). Hence an administrator is not an owner of real property formerly owned by the decedent when living. Even when this fact is not argued or briefed, the court repeatedly raises the issue *sua sponte* (Claydon v Finizie, 7 Conn App 522,524; Pigeon v Hathaway, 156 Conn 175,176-177; see also Planning and Zoning Commission of the Town of Lebanon v Gaal, 9 Conn App 538,543).

In particular an administrator of an estate cannot sue for partition in Superior Court:

> Title to real estate passes to the heirs or devisees at death. Foote v Brown, 81 Conn 218,224; Stevens v Smoker, 84 Conn 569,574; Ziulkowski v Kolodziej, 119 Conn 230,234. As a result, neither the executor nor administrator can sell the real estate, except by a probate court

order pursuant to statute. Olmstead v Brush, 27 Conn 530,535; Dorrance v Raynsford, 67 Conn 1,7; State v Thresher, 77 Conn 70,74; Ryder v Lyon, 85 Conn 245,252.

Connecticut Standards of Title, Chapter XIII, Standard 13.1, Connecticut Bar Association, 1980

The fact that an administrator cannot thus sue is abundantly clear with a glance at the dictionary, case law, and statutory definitions of "interest" and the history of partition.

The provisions of G.S. § 52-500 can only be invoked "upon the complaint of any person interested" (G.S. § 52-500, A-1). Historically the word "interest" has an explicit meaning regarding property:

> Interest,...1...a...legal concern in a thing; esp. right or title to property, or to some uses or benefits pertaining to property
>
> A New English Dictionary on Historical Pinciples, Volume V, H to K, The Philological Society, ed. James A .H. Murray, Oxford, 1901, p.393

the latter "uses or benefits" such as an easement or other legal privilege (Gaston v Plum, 14 Conn 343).

Only an owner has interests in or is a person interested in realty:

> Upon the death of the owner of real estate, neither the executor nor the administrator holds title...Title immediately descends to the heirs or devisees...As a person whose *interests in* real estate would be affected by the relief sought, Jeanne Savoy was an indispensable party... the court's judgement ordering the executor to convey title cannot stand because the executor did not have title and because the person who did have title upon the death of Helen A. Meyer was not a party.
>
> Goodman v Bank of Boston, Connecticut, 27 Conn App

333,341,italics added

The expression "interested in" is statutorily defined in G.S. § 12-400, for purposes of estate taxes, as describing those persons entitled to receive property (G.S. § 12-400, A-3). Similarly, we speak of owning a "one third interest in" a property (SAC-2, A-24; AC-2, A-17; C-1-2, A-12-13).

Case law distinguishes "interest" in a company, such as shares in a company or a share in its capital and stock, from debt which a company may owe to such an interest holder (Riverside Trust Co. v Rogers, 89 Conn 690, 695-696; Stanton v Stanton, 140 Conn 504, 510-511).

Thus are distinguished a "legal interest", such as an easement, "interest in" which is ownership, and a creditor's bill.

Historically, the only court empowered to sell property formerly belonging to a decedent was the Probate Court:

> As early as 1782 such courts were, by an act of legislature, empowered to sell so much of the real estate of a deceased person as should be sufficient to pay the debts and charges in cases where the debts and charges allowed exceeded the value of the personal estate. Prior to that time, as appears by orders for such purpose scattered through the colonial records, such a power had been exercised by the legislature from a very early period.

Buel's Appeal from Probate, 60 Conn 63,65

Note that priorly this power had been vested in and exercised only by the legislature, not the then Court of Chancery, which has never held such a power.

When the legislature did grant a sale, it put that sale under the direction of the Probate Court (Sheldon v Sheldon, 2 Root

509, 510).[2]

From the above facts derive the often-quoted statement from the seminal case Dorrance v Raynsford, 67 Conn 1. 7 "... a court of Probate, when ordering a sale of any real estate of a deceased person, is exercising a special statutory power."

Standard probate references reinforce that such a sale is within the sole jurisdiction of the Probate Court (1 Locke & Kohn, Connecticut Probate Practice, 1951, §71, p.131; Wilhelm & Folsom, Connecticut Estates Practice: Jurisdiction and Proceedure, 1983, §44, p.118).

.....

The Probate Court is thus specially empowered to reach back, as it were, to the former state of a property with its former owner or owners.

Conversely, Superior Court under G.S. § 52-500 has jurisdiction over a property only as it is before the court in its present condition and ownership, not as it was owned at some earlier time.

And as per *supra*, The Probate Court under its "special statutory power" (Dorrance v Raynsford, op. cit.,7) is acting as the vehicle of the power of the legislature to order such a sale,[3] not as the effector of a probate matter. No such special statutory power has ever been granted to the Superior Court.

Thus the only legal mechanism for an administrator to seek partition of real property which formerly belonged to the

---

2. Apparently the sale of a decedent's former property at all is a divergence from English law .

3. Real estate forms no part of the estate the administrator is appointed to administer, and in a probate sale the proceeds constitute a special fund not a part of the personalty of the estate(State *ex rel.* Moriarty v Donahue, 82 Conn 308,313)

decedent while living is through the Probate Court, and the Superior Court does not have and has never had subject matter jurisdiction in that matter.

Since under G.S. § 52-500 the only issue with respect to standing is ownership, and in the present case by the pleadings alone the plaintiff neither claims nor has any ownership in the property in question, the trial court did not have subject matter jurisdiction in this case from the outset.

Note that, in general, because an administrator's lack of ownership is so well established in law, administrator's simply do not sue under G.S. § 52-500. Hence there is little if any recent case law on precisely this issue.

However in Claydon v Finizie, 7 Conn App 522, the Appellate Court, in reviewing a partition action brought by an administrator who claimed a tenancy in common of the property in question, and where in addition the trial court in the case had found a tenancy in common for the administrator (Claydon v Finizie, op. cit., 523), the court dismissed the case *sua sponte* for lack of subject matter jurisdiction in a two step process. In the first step the court addressed the issue that an administrator does not have an interest in real property specifically with respect to G.S. § 52-500:

> Because we decide, sua sponte, that the complaint should have been dismissed for lack of subject matter jurisdiction, we do not consider these claims of error.
>
> Although the complaint does not so state, it is apparent that the plaintiff sought a partition of the real estate under General Statutes § 52-495 and a sale under General Statutes § 52-500. Both statutes confer jurisdiction on the Superior Court "upon the complaint of any person interested." It has long been well settled law that an administrator does not have title to real property but that title passes to the heirs subject

to the right of administration. *Brill v. Ulrey*, 159 Conn. 371,375,269 A.2d 262(1970); *O'Conner v Chiascione*, 130 Conn. 304,306-308,33 A.2d 336(1943); *Bowen v Morgillo*, 127 Conn. 161,168,14 A.2d 724(1940).

Claydon v Finizie, op. cit.,524[4] (Secondly, the court found that a claim of ownership in itself does not confer standing on an administrator[5], not to the point here.)

B. As G.S. § 52-500 is in derogation of common law and

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4. And note the citations, which are not partition actions, cite to only probate partitions: Brill v Ulrey, O'Conner v Chiascione, cite to Bowen v Morgillo which cites to: (1) Perkins v August, 109 Conn 452,456, citing (non-partition cases and) Phelan v Elbin, 84 Conn 208,212, which concerns a probate sale and at 213 cites Dorrance v Raynsford, op.cit., *supra*; (2) Candee v Candee, 87 Conn 85,87, which cites Phelan v Elbin, op. cit.,213, and Dorrance v Raynsford, op. cit., *supra*.

The reference in footnote six (Claydon v Finizie, op. cit.,526-527) to partitions under G.S. §§ 52-495,52-500 involving estates regards actions brought, properly, by owners: the citation, 1 Locke & Kohn, op. cit.,§75 cites Ford v Kirk, 41 Conn 7, a partition action brought by a devisee, Sarah Ford. See also Maggi v Mitchell, op. cit., 1700

5. Note there are circumstances under which an administrator might represent a tenancy in common (t.i.c.), such as via real estate assets of a holding company owned as personalty by the decedent prior to demise. Without knowing on what grounds the trial court found a t.i.c. for the administrator, the Claydon v Finizie court would have to consider the t.i.c. allegation.

Since for an administrator, as distinct from other plaintiffs, a claim of t.i.c. *per se* fails to confer standing, thus by the pleadings alone in Claydon v Finizie the court lacked subject matter jurisdiction.

fundamental rights, it must be strictly construed.

Furthermore, since G.S. § 52-500 permits the court to take an owner's property without the owner's consent, it is elementary that this statute is in derogation of common law, fundamental rights (see *infra*), and G.S. § 47-1 (A-5).

It is a basic principle of law, and the Supreme Court has ruled accordingly, that when a statute is in "derogation of common law or creates a liability where none formerly existed" (Edmundson v Rivera, 169 Conn 630,633), then the statute must be

> ...strictly construed and we are not at liberty to extend, modify or enlarge its scope through the mechanics of construction.
>
> Ecker v West Hartford, 205 Conn 219,233; see Ahern v New Haven, 190 Conn 77,82; Stoll v Judd, 106 Conn 551,556; Bankmart v Richards *et al*, Superior Court at Bridgeport, Nos. 26 92 67, 26 92 70, 26 92 71, 26 92 72 in 3 Conn. L. Rptr. 94(1990), pp.94-95

Specifically regarding G.S. § 52-495 (A-2), the Supreme has said it would "overstep the bounds of its authority if, in the clear absence of legislative intent" it were to "engraft" an enlarged interpretation (Wilcox v Willard Shopping Center Assoc., 203 Conn 318,327).

Hence in the present case the Administrator's lack of not only ownership but absence of any claim of ownership must be strictly construed under G.S. § 52-500.

Finally, there are questions of constitutional and fundamental law, and of public interest and public policy, which are involved in the present case and which should be preserved and addressed.

The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Connecticut Constitution protect against the taking of life, liberty or property

without due process. These guarantees are founded, in our state, on precedents dating back to Roger Ludlow's first formulation of law in 1650 (Code of Laws, 1650,p.1, A-7); see also Acts and Laws of His Majesties Colony of Connecticut in New England, Timothy Green, printer, 1715, p. 1 (A-8,9); Acts and Laws of His Majesty's English Colony of Connecticut in New England in America, Thomas and Samuel Green, printer, 1769, p.1 (A-10,11)).

Clearly, there is no procedural due process without subject matter jurisdiction, so that an adjudication of one is an adjudication of the other.

But because the taking of one's property is so serious an act, it is also an issue of substantive due process. In the triad of life, liberty and property, property stands of equal weight. One's property is one's home, with all of the attendant important qualitative aspects - comfort, security, memories, attachments, identity, irreplacability. While courts tend to focus on financial worth, constitutional and original guarantees dating to the founding of the Connecticut Colony establish clearly and fundamentally that property, in the eyes of the law, is of the same personal and qualitative value as life and liberty - neither of which can be measured in dollars.

The original purpose of partition was to divide the property among owners so that the owners remained thereon. The concept and enactment of partition by sale came much later, In 1844 (Penfield v Jarvis, 175 Conn 463,471), well after the ratification of the 9th and 10th Amendments to the United States Constitution. Hence, the conversion of a person's property to cash, for no public interest, remains suspect, particularly under circumstances where there was no appraisal and no fair valuation process at auction (see *infra*). Returning to the court's focus on financial worth, certainly an opportunity to obtain fair market value or valuation speaks, in court language, to the relevance, in this action, of Constitutional and fundamental guarantees regarding life, liberty and property. As well, the

fundamental qualitative aspects of property cannot be ignored, just as they cannot for life or liberty, neither of which can be impaired absent criminal conduct or public need in emergency or via military draft.

In adjudicating a motion to dismiss, the court must not only consider whether it has jurisdiction under the statute, but also whether exercise of jurisdiction over the defendant would violate constitutional principles of due process (Knipple v Viking Communications, Ltd., 236 Conn 602,606).

.....

In summary, common law, statute, case law, legal history, legal references and definitions of the English language both dictionary and statutory all demonstrate unequivocally that an administrator does not have standing to bring an action under G.S. § 52-500.

DEFENDANT-APPELLANT'S REPLY BRIEF
(Excerpts)

I. ARGUMENT

1. AN ADMINISTRATOR OF AN ESTATE, HENCE THE PLAINTIFF, DOES NOT HAVE STANDING TO SUE UNDER C.G.S. §§ 52-495, 52-500.

In a motion to dismiss, the plaintiff has the burden of proving the court has jurisdiction (Standard Tallow Corp. v. Jowdy, 190 Conn 48,54 cited in Knipple v. Viking Communications, Ltd., 236 Conn 602,607; Thomason v. Chemical Bank, 234 Conn 281).

[Pages 1-10 of this Reply Brief follow on a page by page basis the argument on pages 6-10 of Plaintiff's Brief (PB).]

This court has jurisdiction to determine whether the Superior Court has subject matter jurisdiction to hear a case (Drake v. Planning and zoning Commission, 14 Conn App 583),whether or not that issue was raised at trial (Gemmel v. Lee, 42 Conn App 682,684).

.....

A. Whether or not assets of a property are needed to pay debts of an estate is not relevant to an administrator's lack of standing under C.G.S.§§ 52-495, 52-500.

Only an owner can sue under these statutes, an administrator is not an owner, and in particular a creditor - much less the representative of a creditor - does not have standing to sue (Defendant's Brief (DB),5-20; Vail v. Hammond, 60 Conn 374, 379-380.)

In the first of two paragraphs which the plaintiff devotes to the hypothesis that an administrator can have standing to sue under C.G.S.§§ 52-495,52-500 if assets are needed to pay debts, the plaintiff states: "Connecticut courts have - - since at least 1796 - - recognized that persons appointed to administer estates may, in appropriate circum- stances, bring actions in their representative capacity to resolve claims regarding the estate property entrusted

to them" (PB,6).

The action which is the subject of this appeal does not concern resolving claims about property; it is a partition action. The property in question is not entrusted to the administrator. Ownership and title to property pass upon demise (DB,passim), and real estate "forms no part of the estate which...[the administrator]...is appointed to administer" (State *ex rel* Moriarty v Donohue, 82 Conn 308,313).

Livingston v. Bird (2 Root 438) (PB,6) concerns an ejectment action brought by executors whose decedent held a discharged mortgage (personalty) but not title to the property in question, which comprised part of a "said trust" (Ibid,438-439). The court determined that the executors did not have standing to bring the suit "without special provision in the will, or unless" the estate was both insolvent and needed assets to pay debts"[1] (Ibid, 440). (The court does not say the reasons it cites are sufficient, only necessary.) The Livingston court's ruling is a strong statement of an administrator's or executor's general lack of standing to represent in court former business interests of a decedent.

In the second paragraph the plaintiff states, "In the ensuing years, administrators of estates have been specifically permitted to maintain actions to quiet title" (PB,7) and cites the only three such cases known to the court in Brill v. Ulrey, (159 Conn 371, 374-375) (1990), none of which is to the point.

There are 201 ensuing years between 1796 and 1997. Plaintiff fails to cite any case during those years in which an administrator had standing to sue for partition in Superior Court

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1. "...unless the estate was insolvent, and wanted for paying debts - neither of which existed in this case" (Livingston v. Bird, op cit.,440). Note that "neither" refers to insolvency and need to pay debts, and "wanted for" is the older English for "is in need of", as in "he wanted for a loaf of bread".

Regarding real property formerly belonging to the decedent while living, it is the heirs who can maintain an ejectment (Fleming v. Cox, 11 Conn Supp 41,44).

or the Court of Chancery. Neither has the defendant been able to find any.

In Miner v. Miner (137 Conn 642) the administrator was allowed to continue an action in court, to quiet title, brought by the decedent because the continuing, *post mortem*, of any suit by an administrator was specifically provided for by then Connecticut General Statute §8337 (Ibid, 646-647).

In Pigeon v. Hathaway (156 Conn 175) the administrator was permitted to bring an action to quiet title solely because, due to an option on the property, it was legally considered personalty; the court raises *sua sponte* the issue of title passing upon demise to the heirs.

> Although the right of the plaintiff executor to bring this action is not disputed by the defendant, we cannot overlook the well-settled law that title to real estate passes to the heirs or devisees immediately on the death of the owner. It does not vest in the executor or administrator... In the instant case, we are concerned with the validity of an option to purchase realty which is, of course, a unilateral contract of sale and must be treated as personalty in the hands of the plaintiff executor.
>
> Pigeon v. Hathaway, 156 Conn 175,176-177

In Munger v. Doolan (75 Conn 656), the court found *coram non judice* and void the attachment and foreclosure of a property during the absence of the owner, a non-resident who had not been heard from in 13 years. The question of whether the administrator of his estate had standing to bring suit was not before the court, however addressing that issue hypothetically (Ibid,661) the court specifically did not permit the administrator standing based on any interest in the real estate, but rather based on income from that real estate as personalty (Ibid,662), that is income due the owner while living, given that assets were needed to pay debts[2] (Ibid,662). Furthermore,

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2. "...unless the administrator can avail himself of the income, and possibly the *corpus*, of the real estate in controversy" (Munger v. Doolan, op cit..662). Regarding the phrase "and possibly the *corpus*" (1) it is not known whether the owner was legally dead (2) there was a possibility of probate action regarding the property if the title action were successful.

and perhaps more to the point, recovery of personalty hinged on whether the attachment was void, and the court strongly intimated the attachment was ill motivated (Ibid, passim). It is a general principle of law that fraudulent conveyances are void against creditors (Pepe v Santoro, 101 Conn 694,697-698; Murphey v Dantowitz, 142 Conn 320,325-326). Thus the trial court's finding that assets were needed to pay debts was determinative regarding standing in this case (Hopkins v. McClure, 16 Conn Supp 476,479). In cases where administrators may bring an action under circumstances of a question of fraudulent conveyance they act as "agents of the law" (Sanford v. DeForest, 85 Conn 694,699).

Standing in an action to quiet title is predicated on a *claim* of title or ownership ("...any person claiming title to, or any interest in..." [note the implicit definition of "interest" as "title"; see DB,8-10] (C.G.S.§ 47-31(a); A-2). Standing in a partition action is predicated on ownership ("...any person interested..."; C.G.S.§§ 52-495,52-500; A-1). ...

.....

(Conversely, under C.G.S.§§ 52-495,52-500 Superior Court has jurisdiction only over the property in its present state before the court.

In Brill v. Ulrey (159 Conn 371) (PB,7), an action to determine title, the court ruled on two issues: (1) that although a claim of interest (ownership) in general confers standing under C.G.S.§ 47-31, it does not confer standing for an executor absent an allegation of need of assets to pay debts[3] (Ibid,375) (note again the court holds the latter necessary without ruling it sufficient); (2) that even if the executors had had standing,

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3. The executors apparently sued under color of a claim of ownership [for the estate] as executors, not to determine whether title properly rested with the decedent prior to demise.

...the record fails to reveal they had any interest in the land...and thus the judgement as to them was also defective as being unsupported by the evidence.

Brilly v. Ulrey, 159 Conn 371,376

the court having already noted that title to real property passes upon demise to the heirs (Ibid,375).

.....

...regarding payment of debts of an estate. (Such a determination is a matter for the Probate Court anyway (Sheldon v Sheldon 2 Root 512,514).)

(A.C. 16867)(CV95-0373971 S)

KEITH GALLANT, ADM. :
SUPREME COURT

VS. :

JOAN E. CAVALLARO, ET AL. :
OCTOBER 5, 1998

PETITION FOR CERTIFICATION

Defendant Joan E. Cavallaro petitions the Supreme Court for certification to appeal from the judgment of the Appellate Court in the above captioned case (Opinion, August 25, 1998).

1. Questions Presented

a. Did the Appellate Court err in affirming trial court's confirmation of sale of property absent proper judgment against one of the property owners under Practice Book §§17-20(e), 17-21?

b. Did the Appellate err in:

I. holding C.G.S.§45a-98 confers subject matter jurisdiction on Superior Court for C.G.S.§52-495, 52-500 in an action where by established Connecticut law the court lacks jurisdiction;

II. failing to follow controlling precedent of Vail v Hammond (60 Conn 374), Johnson v Olmstead (49 Conn 509);

III. misconstruing Claydon v Finizie (7 Conn App 522) regarding plaintiff standing?

c. Was the *pro se* appellant deprived of fundamental fairness, due process and equal protection by the Appellate Court's according less weight to the extensively researched and cited statutory and case law in her "well analyzed brief" (Opinion, p.3) than to the argument presented in the brief of the plaintiff-attorney?

d. Should the Appellate Court's decision be reversed in consideration of public interest and public policy?

e. Has the appellant been deprived of fundamental rights, due process, common law rights and rights and protections under Article 1, Sections 8-11 of the Connecticut Constitution and the Fifth, Fourteenth, Ninth and Tenth Amendments to the United States Constitution in this action?

f. Did the Appellate Court err in declining to review the circumstances of the sale?

2. Basis for Certification

Under P.B.§84-2(1), this is both a question of substance not theretofore determined by the Supreme Court and also decided in a way probably not in accord with applicable decisions of the Supreme Court. (a.,b.,c.,d.,e.)

Under P.B.§84-2(2), the decision under review is in conflict with other decisions of the Appellate Court. (b.,c.,f.)

Under P.B.§84-2(3), the Appellate Court has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by another court, as to call for an exercise of the Supreme Court's supervision. (a.,b.,c.)

Under P.B.§84-2(4), there is a question of great public policy and public interest involved. (b., c.,d.,e.)

There are substantial questions involved which should be considered in the "interests of justice to the particular litigants" (State v Cullum, 149 Conn 728,730) and in the "interestsof preserving a stable, sound and consistent body of case law in the state"((Ibid730)(a.b.c.d.e.f.)

.....

b.,c. This is the first instance in Connecticut law in which Superior Court has been held to have jurisdiction over partition or sale of real estate which formerly belonged to a decedent while living. In its decision the Appellate Court:

(1) constructed subject matter jurisdiction (smj) for

Superior Court in a first such interpretation of C.G.S.§45a-98. The Court said:

Section 45a-98(b) expressly provides that "[t]he jurisdiction of courts of probate todetermine title or rights... is *concurrent* with the jurisdiction of Superior Court and does not affect the power of Superior Court as a court of general jurisdiction." (Emphasis added.) (Opinion,p.3)

C.G.S.Secs.45a-98(a)(3),(b) specifically limit this jurisdiction to a determination of [title and] rights "*of possession and use*" only (italics added).

(2) in holding C.G.S.§45a-98 applies, did not address established Connecticut law presented in defendant's brief (DB) that Superior Court lacks subject matter jurisdiction *per se* over sale of lands formerly belonging to the deceased (power to sell such lands historically vested only in legislature (Buel's Appeal from Probate, 60 Conn 63,65), which grants such "special statutory power" exclusively to Probate Court (Dorrance v Raynsford, 67 Conn 1,7; 1 Locke & Kohn Connecticut Probate Practice, 1951, §71, p.131; Wilhelm & Folsom, Connecticut Estates Practice: Jurisdiction and Procedure, 1983, §44, p.118; Connecticut Standards of Title, Chapter XIII, Standard 13.1, Connecticut Bar Association, 1980; *inter alia*; DB pp.8-12)

(3) determined fields of operation for C.G.S.Secs.45a-326,52-500 by (i) assuming C.G.S.Sec.45a-326 applied in the present case; (ii)construing defendant's argument to be that Superior Court lacked smj only because an estate was in settlement; (iii) construing that C.G.S Sec 52-503 fully determined the fields of operation of C.G.S.Secs 45a-326,52-500 (Opinion,2-3).

No one argued that C.G.S.Sec45a-326 applied to circumstances such as the case at hand. No part of the defendant's case law argument that Superior court lacks smj involved whether there is an estate in settlement, or C.G.S.Sec.52-503 as relevant to the case or as a defining element of fields of operation of C.G.S.Secs45a-326,52-500 (DB,passim; defendant's

reply brief (RB)passim)

(4) did not follow controlling Connecticut precedent that the only purpose of C.G.S.§§52-495,-500 is to divide property among owners (Johnson v Olmstead, 49 Conn 509,517, see Wilcox v Willard Shopping Center Assoc., 208 Conn 318,325, DB7) and

> "...that the statute applies only in cases of ownership...[O]nly those interested therein as owners are so entitled. [citations omitted] This statute does not confer any power on the court to order a sale of property for the purpose of paying debts. (Vail v Hammond 60 Conn 374,379-80 (citations omitted) DB7)

Mr. Gallant did not claim any title or ownership interest in the property either as administrator or through an estate vehicle.

(5) saw the key distinction between the present appeal and Claydon v Finizie (7 Conn App 522) as that "... the plaintiff-administrator in *Claydon* did not allege that partition of the property was necessary to settle claims against the estate" (Opinion, p.4).

In *Claydon,* the only known case of a fiduciary suing for partition under C.G.S.Secs 52-495, 52-500, the administrator alleged and the trial court found that the administrator held a tenancy in common ownership interest in the property. In dismissing the action *sua sponte* for lack of smj, the *Claydon* court noted that title to real estate passes on demise to the heirs (*Claydon*, Ibid 524, DB13) and that

> "The precise question of whether an administrator, alleging nothing more than a *tenancy in common*, is a "person interested" under either of these two statutes is a case of first impression." (*Claydon*, Ibid,524-5, DB12-14) (Italics added.)

The *Claydon* court held that for an administrator ownership alone is insufficient interest under C.G.S.Sec52-500, a necessary, but not necessarily sufficient, additional requirement being need of

assets to pay debts. In the case at hand, the Appellate Court reasoned:

> The converse of the *Claydon* rule is that if the administrator alleges that the property is needed to settle claims against the estate, then he meets the requirement of having an interest in the property. (Opinion, p.4)

Thus the Appellate Court held that *absent* ownership interest in the property, a claim of assets needed conferred interest (ownership).

The Appellate Court did not address (i) the case law and statutory established definition of "interest" with respect to real property as " ownership" (Riverside Trust Co v Rogers,89 Conn 690,695-696, Stanton v Stanton, 140 Conn 504,510-511, *inter alia*, DB9-10); (ii) the difference between a *necessary* condition and *sufficient* one (RB,passim); (iii) the distinction between "can" assert a cause of action (standing)(i.e. ownership plus need of assets) and "cannot", as a matter of law, assert a cause of action (smj)(i.e. no ownership)(DB, Issues and passim).

Mr Gallant alleged proceeds of a partition sale were needed to pay unspecified estate debts and was left to his proof by a defendant. No evidence was presented at the partition hearing. Both in the written judgment and at oral decision the trial court specifically did not find that proceeds were needed to pay any estate debts.

The Appellate Court did not address whether actual judgment that assets were needed applied or citations that such a determination is within the sole jurisdiction of the Probate Court (RB8).

4. Concise Argument

a. The facts as recited in 3.a. *supra* violate P.B.Secs.17-20(e),17-21(a),(d).

As C.G.S.Secs.52-495,52-500 are in derogation of common law they must be strictly construed statutorily (Ecker v West Hartford, 205 Conn 219,233) and procedurally (Bankmart v Richards et al., Superior Court at Bridge port, Nos. 26 92 67, 26

92 70, 26 92 72, in 3 Conn L. Rptr. 94(1990), pp.94-95 (foreclosures dismissed because corporate officer not an attorney signed procedural papers)).

b.,c. Prior to the 1993 enactment of C.G.S.Sec.45a-98, Superior Court held sole jurisdiction over title determinations under C.G.S.Sec.47-31. C.G.S.Sec.45a-98 added nothing new to Superior Court's powers. Its purpose was to add to Probate Court a limited niche of title determination:

> REP. RADCLIFFE: You've also recommended...the probate courts be given, under certain circumstances, the ability to try title concurrently with the superior court. How would that work? ... (minutes of the Judiciary Committee, March 19,1993, p. 001898)
>
> JUDGE ROBERT KILLIAN: The reality of this jurisdictional request is that there are many matters, particularly concerning jointly held small bank accounts which currently are left unadjudicated because it just does not sustain the burden of the Superior Court costs. (Ibid, p. 001899)

C.G.S Sec.45a-98 applies only during the settlement of estates ("...property that constitutes, or may constitute, all or part of ... any decedents estate, ...which...estate is otherwise subject to the jurisdiction of the Probate Court" (C.G.S.Sec.45a-98(a)(3)) and cannot confer rights of partition (cannot bind future interests (Penfield v Jarvis, 175 Conn 463) or create new rights of administration, the latter being specific and statutory. Furthermore a partition action does not try title.

In evoking C.G.S.Sec.45a-98 the Appellate implicitly recognized the validity of the defendants research and citations that Superior Court lacks subject matter jurisdiction over real estate formerly owned by the deceased (DB,*supra*;DB,passim). The latter is clear since Superior Court lacks smj over the deceased, real estate passes on demise to the heirs, and an administrator cannot represent the decedent (Wheeler's Appeal from Probate, 70 Cinn 511,515). Superior Court has no right at common law to sell lands of the deceased (Wooster v Hunts

Lyman Iron Co., 38 Conn 256, 259).

> ...the complaint is silent as to whether it is real or personal estate which he is seeking to pursue.If it is the former, he has mistaken his remedy which is through the medium of an order of sale through the Court of Probate. (Mathewson v Wakelee, 83 Conn 75, 78-79, 1910; (citations omitted) [after joining of courts of law, equity] (suit against administrator to retrieve assets from an estate)

C.G.S.Sec.45a-326 does not confer standing on an administrator *per se* to seek partition. The statute provides that the "...administrator of the estate and *the owner or owners* of the major portion of the other interest..." (italics added) in the property may apply in Probate Court. (The statute also does not apply in the case because Mrs. Cavallaro did not "die owning" the property within the meaning of the statute ("person who died owning" C.G.S.Sec.45a-326)).

The overlap in jurisdiction between C.G.S.Sec45a-326 and C.G.S.Sec.52-500 is the right of an heir or devisee to bring the action under 52-500 or, with a majority and the administrator, under 45a-326 (Ford v Kirk, 41 Conn 1, Maggi v Mitchell (No.2604 (Feb11,1992) 1992 CT Sup 1699,1700, DB7,13-14).[1] C.G.S.Sec.52-503, a Superior Court Statute, merely limits the ability of an heir or devisee to bring partition action during settlement.

Neither can equity avail (*Mathewson, supra*), and there is adequate remedy at law: If the property is in the estate, the administrator can sell it under any of many probate statutes regarding sale of real property. These statutes are honed to the many particular circumstances of settlement of an estate. And in a probate sale of real estate the proceeds form a special fund not

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1. Note the reference in *Claydon*, op cit., 526-527,fn6, to 1 Locke & Kohn, op cit., Sec.75, refers to only one case: Ford v Kirk, op cit., a partition action brought by a devisee.

part of the personalty assets ot the estate (State ex rel. Moriarty v Donahue, 82 Conn 308,313) and are distributed as the real estate would have been. There are no provisions under C.G.S. Sec.52-500 to distribute proceeds to a special fund.

There is no indication that the legislature intended, when the probate sale of property statutes are not chosen, to circumvent probate via Superior Court.

Furthermore, at law or equity, to prevail one must, in a two step process, first demonstrate a claim and obtain a judgment on that claim (Mathewson v Wakelee, op cit.,80-81). Even if need of assets to pay debts conferred smj, that need would have to be successfully adjudicated first. It is well established law that Probate Court has exclusive jurisdiction over administrators' accounts (First National Bank & Trust Co. v McCoy, 124 Conn 111,115; C.G.S.Sec.45a-175). Neither the administrator, Superior Court, nor agreement of the defendants could determine such a judgment and with it, confer smj. At a minimum, an administrator would have to present in evidence in a Superior Court action a determinationl by Probate Court that assets were needed to pay debts.

No party to this suit, nor the Appellate Court, has cited a single reference in which a fiduciary of an estate was able to bring a partition action in Superior Court. The appellant meticulously researched every case cited in this action, and their citations, and found no reference in any case to such an action (DB12-14;RB passim).

Lastly the important distinction between real estate which survives demise and real estate which does not (State ex rel Moriarty v Donahue, op cit., 313 (real estate forms no part of the estate the administrator is appointed to administer) which underlies all of these questions presented should be briefed and addressed.

d. As a matter of great public interest and public policy, elder persons have relied for 350 years on the specific statutory procedures of Probate Court regarding their real property. If matters are now to be settled in Superior Court, citizens will have to consider changing their wills, and in particular, also plan to set

aside large sums of money to cover Superior Court litigation. One of the purposes of the probate system, as Judge Killian indicated *supra*, is to avoid that monetary burden on estates.

More importantly, the elderly have a right to their dignity. Elder persons are constantly faced with the dilemma of divesting themselves of their property, and often their dignity and control over their lves, in order to secure the property for their heirs. Some persons chose to retain financial control over their circumstances so as not to become a recipient of welfare. But that choice is predicated on the knowledge that if assets are not used during life - even if that involves sacrifice - the property is secured for the heirs.

Mrs. Cavallaro was disabled for the last 12 years of her life. She paid her bills and taxes in advance and died without medical expenses. The appellant took full care of her for 12 years, in the process saving the State of Connecticut over $400,000. No one has asked for anything more than their right to inherit their due one third of the property.

In a sense, what this whole case is about is whether Mrs. Cavallaro's heirs retain the right to their one third each of the property, or whether one half the property goes into the personalty assets of the estate. In short, does the Law of Descent still hold? That issue alone warrants a final adjudication but the Supreme, not only Appellate, Court.

e. Without subject matter jurisdiction there is no due process, so that an adjudication of one is an adjudication of the other.

No court has subject matter jurisdiction over the "best interests" (C.G.S.Sec.52-500) of a competent adult.

f. Adequate record of the process of the judge's decision was preserved for review. -

CONCLUSION

The Appellate Court has effected a substantive change in the law. Even if the decision is to stand, it should be the Supreme Court which makes that determination.

The petition for certification should be granted.

DEFENDANT-APPELLANT'S MOTION TO RECONSIDER CERTIFICATION
(excerpts)

Quick Refresher: In Connecticut when a person who owns real estate in their own name dies intestate, all title and ownership of the real estate pass directly to the heirs at demise (F3,CST, passim (letters denote citations in Tables of Authorities of defendant's brief (DB) and reply brief (RB) in the Appendix)). The probate court does not pass or distribute the real estate which has passed on demise but merely serves to determine the heirs to whom the real estate has passed (CST). The heirs can sell, mortgage [or partition] the realty regardless of estate settlement (F3,M1,CST).

Real estate which passes on demise forms no part of the estate the administrator is appointed to administer (S4,SS4).

If an administrator demonstrates to probate court that personalty assets of the estate are insufficient to pay estate debts, the administrator may apply in probate court only (B4,D3) to sell part or all of the real estate which formerly belonged to the decedent while living (Ibid). Only probate court has jurisdiction over such lands (Ibid). From earliest times the legislature had sole access to such lands and it designated that access by special statute to probate court only (B4). Superior court has no right at common law to access such lands (Wooster v Hunts Lyman Iron Co., 38 Conn 256, 259, presented and accepted at oral argument).

When probate court does sell such real estate the proceeds are put in a fund separate from the personalty of the estate (requiring a separate bond when the administrator is committee) (S4,SS4). The fund is not a part of the estate under administration, and the fiduciary has no powers of administration over the fund (Ibid). The fiduciary may apply to probate court to pay from the fund estate debts as necessary, but any monies remaining are distributed by probate court separate from estate distribution in the manner the real estate would have been (e.g. by descent) (Ibid).

The above constitutes the *only* rights an administrator has regarding real estate formerly owned by the decedent while living. They are statutory. T's rights in the property ended at demise.
Partition: In Connecticut there is no statute, none, which gives an administrator or executor the right to partition real estate which has passed on demise. There are two partition statutes:

(1) C.G.S. Sec. 45a-326 applies only to probate court, a court of limited jurisdiction. For this reason, and also because the statute is in derogation of common law and fundamental rights, the statute must be strictly construed (A1,B1,W1).

The statute occurs in Chapter V : Settlement of Decedent's Estates of the probate statutes. Real estate which passed on demise is not part of the settlement of an estate (*supra*). It reads:

(a) During the settlement of the estate of any person who died owning an undivided interest in any property not specifically devised or bequeathed, the executor or the administrator of the estate and the owner or owners of the major portion of the other interest therein may apply in writing to the court of probate having jurisdiction of the estate to order a partition of the same.

The statute (which incidentally does not mention real property) refers only to real estate which has passed as personalty to the fiduciary through a personalty vehicle (trust, holding company). The phrase "died owning", unique to this statute, is a catch-all phrase describing the property titularly held by the administrator as a stand-in for the decedent until distribution. Since real estate passes on demise, one cannot complete the dying process and continue to hold the realty, as one does with personalty. This fact is reinforced by the phrase "and the owner or owners of the major portion of the other interest". "Interest" with respect to real estate means ownership (G3,R2,S3). The balance of the "other interest" is the interest to which the administrator holds title; when the real estate passes on demise, the administrator does not hold title and hence has no interest. Secondly, although any one owner can bring a partition action in

superior court (except an administrator; see *infra*), the probate statute requires the sum of owners of the major portion of the "other interest " plus the administrator. The administrator cannot partition the property; his presence merely allows owners to partition in probate court, which is much faster, as a convenience of settlement.

.....

Claydon v Finizie: It is important not to just read the syllabus in Claydon v Finizie (7 Conn. App. 522) because its synopsis is misleading.

In *Claydon* : (1) The plaintiff administrator alleged in his complaint that he held as administrator [estate is not a legal entity, cannot hold title] a titular tenancy in common ownership (523); (2) The trial court declared that the administrator held the interest as alleged (523); the appellate court held that: (3) In cases where title passes on demise, an administrator is not a person "interested" ("does not have title to real property") (524); (4) The case before the court was distinguished by the fact that the administrator alleged [and the trial court found] a tenancy in common and was a case of first impression (524-5); (5) That although the administrator alleged an interest it was not "sufficient interest" (526, second paragraph) because as administrator he held interest only temporarily and for limited purpose (526, first paragraph); (6) That "clear authority" that the administrator needed something more for sufficient interest was Brill v Ulrey (159 Conn 371), a title determination action, which required an allegation of need of assets to pay debts (525) (and see *infra*); (7) The case was dismissed *sua sponte* for lack of subject matter jurisdiction (smj); (8) The administrator might have standing to sue under C.G.S. Sec. 45a-326 (526-7) (i.e.since the administrator held a title interest, and the statute designates administrators). The case at hand falls into category (3) above, as the administrator neither alleged nor holds an

ownership interest. His allegation of need of assets is not in addition to interest, and it is interest which is required for him to be encompassed within the partition statute, a statute for owners. Furthermore by controlling case law the partition statute "...does not confer any power [smj] on the court to order a sale of property for the purpose of paying debts" (V1,*supra, 379-80*).

.....

(2) (p.3) The crux of Cavallaro's argument is that when an estate is in settlement, the Probate Court has sole jurisdiction to order a partition of property within the estate to the exclusion of Superior Court.

No. The appellant clearly demonstrated (DB5-15) that whether an estate is in settlement or not, Superior Court lacks smj over lands formerly belonging to the deceased while living , but that Probate Court was given smj by special legislation (B4,D3). Superior Court can partition the *property*, but the division is *among owners* (J3,V1) (current owners (DB11)). And only an *owner* can bring the action (J3,V1). It cannot partition between past and present.

.....

Superior Court can partition property only among owners and only if the complaint is brought by an owner (J3,V1).

Superior court can partition property while an estate is in settlement only among owners and only if the complaint is brought by an owner (J3,V1).

If an administrator of an estate holds title (as personalty) to all of a piece of property, equitable ownership being held by the heirs, none of the owners (heirs) can partition the property until the estate is ready for distribution (C.G.S. Sec. 52-503). (Clearly the administrator cannot partition the property among himself; realty passing on demise is not distributed.)

If a fiduciary holds title (as personalty) to part of a

property not specifically devised, hence that property will be distributed under administration, he and the owners of the majority of the other interest may partition the property, thus separating out the portion to be distributed (C.G.S. Sec.45a-326).

Every statute, every case law of the hundreds the appellant has researched during this appeal is consistent with this, and only this, diagram of partition.

(5) (p.4) The only significant distinction between *Claydon* and the appeal before us is that the plaintiff-administrator in *Claydon* did not allege that partition of the property was necessary to settle claims against the estate.

No. The significant distinction is that in *Claydon*, the administrator alleged, and the court found, that the administrator held a tenancy in common. That is, the administrator had an interest.

The converse of the *Claydon* rule is not that allegation of need of assets confers interest (interest is ownership). The converse of the *Claydon* rule is that if an administrator has an interest, allegation of need of assets may confer sufficient interest. [Note that in a title determination action such as *Brill v Ulrey* an administrator seeks not to determine whether he holds title, but whether title was held by the decedent prior to demise; hence allegation of need of assets may confer cause of action, since if the decedent had owned the property the administrator might access it via probate court. Without such an allegation, only the beneficiaries have a cause of action (HH1).]

When title has passed on demise, allegation of need of assets cannot confer interest.

In the case at hand, the allegation of need of assets is irrelevant. The plaintiff's lack of standing invokes lack of smj, because it is incurable: He cannot have interest (ownership). He cannot allege anything to gain standing. The court cannot award itself smj when does not have it.

Hence the Appellate Court's argument regarding standing

should have been included in the section on smj, as it was in the defendant's brief (DB5-10,13-14).

B. Synopsis

I. The trial court could not have determined a right to partition in G or smj for the court because the only right permitting partition is ownership, and G cannot have ownership. The problem is not that under C.G.S. Sec.45a-98 the court cannot determine rights, but that partition does not encompass any right except ownership.

II. What this entire cumulation of errors boils down to is that G initiated this action based only on his (unverified) allegation of need of assets to pay estate debts. That is, he presents as a representative of creditors, as holding a kind of quasi-lien. Essentially, G is trying to use the partition statute in place of attachment or foreclosure, each of which have strong due process requirements, and are debt-specific and have redemption dates.

(3)

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SUPREME COURT, U.S.

No. 99-584

In The
Supreme Court of the United States

JOAN E. CAVALLARO,
Petitioner
v.
KEITH GALLANT, ADM.,
Respondent

On Petition For A Writ of Certiorari
To The Connecticut Court Of Appeals

REPLY BRIEF

Joan E. Cavallaro
Pro Se
P.O. Box 9
Branford, CT 06405
(203) 488 - 1169

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RESPONSE TO WAIVER

It is always heartening when one's opposition fails to present any legal argument or citation which contravenes the Petition for Writ of Certiorari.

The flip side of a Waiver however is the presentation that the controversy at hand is not important enough to warrant final consideration by this Court. I disagree.

This Court has emphasized that issues regarding Administrator's affecting sale and title of real estate are of "great importance"(Chief justice Marshall, observation in delivering opinion, cited in Williamson *et al.* v Berry 12 L.Ed. 1170,1199).

The points in this case have been addressed and decided by the Supreme Courts of numerous states. (Administrator lacks standing to institute partition action (Crigler v Frame 632 S.W.2d 94,95-6 (Missouri)), absent specific directions in the will or statute, which must be explicit (Nelson v Haisley 39 Fla 135, Ryer v Fletcher-Ryer Co. 58 P. 908,909-10 (California)), is never "interested" within the meaning of the statute (Calmese v Weinstein 351 S.W.2d 437,439 (Arkansas), Garrison v Cox 99 NC 478, Nason v Willard 2 Mass 478, Wood v Bryant 68 Miss 198)), even if assets are needed to pay debts (Owings v Owings 114 N.W. 393 (Michigan), Throckmorton v Pence 25 S.W. 843,844 (Missouri), Nason v Willard op cit., Wood v Bryant op cit.), recourse being elsewhere and statutory (Owings v Owings op cit., Throckmorton v Pence op cit., Wood v Bryant op cit.), and such cases are regularly dismissed and dismissed *sua sponte* (Crigler v Frame op cit., Calmese v Weinstein op cit., Owings v Owings op cit., Throckmorton v Pence op cit., Romero v Rader 146 La 964, Nason v Willard op cit., and the Connecticut cases as cited in the Petition for Writ of Certiorari at pp. 10, A-24-5, A-30-33)).

No statute in Connecticut gives an administrator the right to partition (Petition for Writ of Certiorari, p.10).

This case stands at a juxtaposition of three vital issues:

The role of the court in making substantive versus procedural law ("The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature" (regarding state law) Bank of Hamilton v Lessee of Ambrose Dudley, Jun. 7 L.Ed. 496,522).

That the legal principle that a lienholder or creditor is not converted to a holder of an ownership interest maintains in partition actions as well as elsewhere (Calmese v Weinstein op cit.,440, Speer v Speer 14 N.J.Eq. 240,251, Vail v Hammond 60 Conn 374).

That *Pro Ses* have the Constitutional right to Equal Protection of the law when they access their courts.

This case meets the test of importance.

Conclusion

The case at hand merits granting of Certiorari or summary dismissal of the original action under Rule 16 of the Rules of the Supreme Court of the United States.

Joan E. Cavallaro
Pro Se
P.O. Box 9
Branford, CT 06405
(203) 488-1169

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SUPPLEMENTAL BRIEF

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Pro Se
P.O. Box 9
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PRECLUSIVE SUPPLEMENT

The purpose of this paragraph is to seek to protect and preserve my rights to have my consideration for certification to appeal to this Court not be diminished or minimized in the event of a last-minute Supplement by the opposition, which I may not receive or have time to respond to in time, *in re* a technicality which I believe to be staged, and have taken the appropriate steps thereunto, regarding a matter on the face of it adjunct to the proceeding at hand.